Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

JAMES DALE SMITH, personally and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a City regulation that prohibits all "soliciting, begging or panhandling" in a public forum violate the First Amendment?

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OPINIONS BELOW

The opinion below is reported. *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999). It is reproduced in the Appendix at 1a-6a. The final summary judgment order of the district court is unreported. It is reproduced in the Appendix at 7a-17a. A prior opinion of the district court, denying a motion for preliminary injunction, is reported *sub nom. Chad v. City of Fort Lauderdale*, 861 F. Supp.1057 (S.D. Fla. 1994). It is reproduced in the Appendix at 18a-34a.

STATEMENT OF JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on June 2, 1999. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Constitution, First Amendment

Congress shall make no law. . . abridging the freedom of speech. . . .

STATEMENT OF THE CASE

The Court of Appeals held that the City of Fort Lauderdale Beach Rule prohibiting "soliciting, begging or panhandling" did not violate the First Amendment. The 1993 Rule applies to "a five mile strip of beach, a new, one-and-a-half mile promenade sidewalk between that beach and Highway A1A, and the commercial-area sidewalk on the opposite side of Highway A1A. . . ." App. 2a.

Enforcement of the rule would prohibit the solicitation depicted in this New Yorker cartoon.

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The court below acknowledged that the rule restricts speech in a public forum (App. 3a), but upheld it as a reasonable time, place, or manner restriction:

> The City has made the discretionary determination that begging in this limited beach area adversely impacts tourism. Without second guessing that judgment, which lies well within the City's discretion, we cannot conclude that banning begging in this limited beach area burdens "substantially more speech than is necessary to further the government's legitimate interest." Rule 7.5(c)'s suppression of begging in the Fort Lauderdale Beach area is materially mitigated by the allowance of begging in streets, or sidewalks and in many other public fora throughout the City.

App. 5a. (citation omitted).

The City's rationale for the ban on begging and solicitation was "to provide citizens with a safe environment in which recreational opportunity can be maximized." App. 2a.

The pertinent portion of the rule provides:

> 7.5 The following regulations are intended to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate:
>
> * * *

> 7.5(c) Soliciting, begging or panhandling is prohibited.

Violations of Rule 7.5(c) would be enforced by Rule 11.3, which provides for banishment, arrest and prosecution:

> Trespass
> Any person or group found in violation of the above rules and regulations shall be ordered to leave all City of Fort Lauderdale parks, beaches and recreation facilities for a minimum 24-hour period. Any person who fails to leave all facilities, parks or beach at the time requested may be arrested and prosecuted for trespassing or prosecuted under other existing ordinances.

Rule 7.5(c) was challenged by Mark Chad, a homeless Broward County resident, on behalf of a class of homeless persons who beg, panhandle or solicit money or food within the designated Fort Lauderdale Beach area. After Chad's death, James Dale Smith, who was similarly situated, was substituted as the named class representative. Petitioners recognized that "providing a safe, pleasant environment and eliminating nuisance activity on the beach is a 'significant government interest.'" App. 4a. But they contended that, under the stipulated facts, "[t]he City's rule banning peaceful, nonthreatening begging goes too far. Nothing in the record shows that it is necessary; nor is it narrowly tailored." Appellants' Initial Brief in the United States Court of Appeals, p. 14.

The court below disagreed and affirmed the summary

judgment in favor of the City. App. 7a-17a. This petition seeks review of that decision.[1]

REASONS FOR GRANTING THE WRIT

By holding that the City can completely prohibit all soliciting, begging and panhandling in a public forum simply by asserting that it wishes to prevent "nuisance activity and to provide a safe pleasant environment," the decision below conflicts with *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Schneider v. State of New Jersey (Town of Irvington)*, 308 U.S. 147 (1939), and a host of other First Amendment decisions that require narrow tailoring of content neutral restrictions on speech and record evidence to support the asserted interests in suppressing speech.

The court below accepted the City's bare statement "that begging in this designated area adversely impacts tourism." App. 5a. Nothing in this record supports that rationale for Rule 7.5(c). There is no evidence of complaints from tourists, business owners, or residents that soliciting or begging in any form constituted a nuisance interfering with

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[1] Content neutrality was not an issue below because Rule 7.5(c) bans all solicitations without regard to content, including commercial and other forms of personal and political solicitation. The City Manager said: "I think any kind of solicitation, even Governor Chiles, when he ran for governor didn't solicit down there. He walked on the beach . . . but he didn't stop and solicit anybody." "If he stopped people and tried to solicit, then we would consider that [a violation]."

recreation or business.

The court had a duty to "assess the substantiality of the governmental interests asserted [and] also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. . . ." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981). *See also, Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939) (legislative preferences or beliefs not sacrosanct and courts must "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights"); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) ("'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . . *NAACP v. Button*, 371 U.S. 415, 438 (1963)'").

The decision below relied upon the *Ward v. Rock Against Racism* reminder that a content neutral regulation of the time, place, or manner of protected speech "need not be the least restrictive or least intrusive means" of serving a substantial governmental interest. App.5a. But the decision failed to apply *Ward's* protective pronouncement addressing the concept of narrow tailoring:

> Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *See Frisby v. Schultz*, 487 U.S. at 485 ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an

appropriately targeted evil").

Ward, 491 U.S. at 799 (footnote omitted).

In Fort Lauderdale, all begging and soliciting is banned in a 166-acre continually open public forum. By not requiring that the Rule be narrowly tailored, either by focusing on aggression, intimidation or harassment, *see Roulette v. City of Seattle*, 850 F. Supp. 1442, 1451 (W.D. Wash. 1994) (addressing ordinance prohibiting "aggressive begging); *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1203 (C.D. Cal. 1997) (upholding an ordinance entitled "Prohibition Against Abusive Solicitation" because it was narrowly tailored to stop abusive or threatening conduct and "limited to places where harassment and intimidation are more likely to occur . . . ."), or by providing designated locations for soliciting (*Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981)), the decision failed to follow this Court's First Amendment principles.

The court's view that allowing begging in other public fora in the City "materially mitigates" the First Amendment injury (App. 5a) poses another conflict. *See Schneider, supra:*

> It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate

> places abridged on the plea that it may be exercised in some other place.

Schneider, 308 U.S. at 163.

This Court has never upheld a law completely precluding speech in a public forum based upon the bare assertion that the speech is a nuisance and that the environment would be more "pleasant" if the speech were banned. *Compare*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994) (injunction prohibiting peaceful but uninvited approaches in a public forum was inconsistent with First Amendment); *Tinker v. Des Moines Comm. School Dist.*, 393 U.S. 503, 508 (1969) ("in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). The decision below conflicts with those principles.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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